(2)

No. 95-1298

Supreme Court, U.S.
F I L E D
MAR 19 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: INFOTECHNOLOGY, INC., A Delaware Corporation,

Debtor.

JOHN S. ABELES; EARL W. BRIAN; DWIGHT W. GEDULDIG; JOHN E. KOONCE; WALLACE O. SELLERS; PAUL STEINLE; and JOHN BERENTSON,

Petitioners,

—v.—

INFOTECHNOLOGY, INC.,

Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION and AVACUS PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DEBTOR-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether fifty (50) days notice of a hearing to consider final approval of a preliminary settlement agreement known as the Avacus Stipulation and Order incorporated for final approval in a plan of reorganization is violative of 11 U.S.C. § 1129(a)(3) of the Bankruptcy Code or Rule 9019(a) of the Federal Rules of Bankruptcy Procedure.

2. Whether the Bankruptcy Court, in applying the standards announced in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct 1157 (1968), abused its discretion when it approved a settlement between the Pension Benefit Guaranty Corporation and Infotechnology, Inc.

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DEBTOR-RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

In addition to the statutes, rules, or regulations cited by Petitioners in their Petition for Writ of Certiorari, the following statutes and rules are relevant to this case:

Section 1123(b)(3)(A) of the Bankruptcy Code, 11 U.S.C. § 1123(b)(3)(A), authorizes a proposed settlement agreement to be incorporated in a plan of reorganization for a Bankruptcy Court to review and give final approval at a hearing on confirmation.

Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure require notice to, among others, all creditors, for approval of a settlement on no less than twenty (20) days notice.

STATEMENT OF THE CASE

On March 5, 1991, Infotechnology, Inc. ("Infotech") and its wholly-owned subsidiary Questech Capital Corporation ("Questech") (Infotech and Questech are collectively referred to as the "Debtors") each filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtors were authorized to continue in the operation and management of their respective businesses as a debtor-in-possession.

On April 18, 1994, the Bankruptcy Court approved the Debtors' Joint Disclosure Statement (the "Disclosure Statement") as containing adequate information within the meaning of Section 1125 of the Bankruptcy Code and, *inter alia*, fixed a date for effectuating service of the Disclosure Statement and the third joint plan of reorganization (the "Plan") pursuant to Rules 2002 and 3017 of the Federal Rules of Bankruptcy Procedure. The Bankruptcy Court further sched-

uled a confirmation hearing to take place on June 21, 1994 to consider final approval of the Avacus stipulation and order (the "Avacus Stipulation and Order"), the Pension Benefit Guaranty Corporation term sheet (the "PBGC Term Sheet"),[1] and confirmation of the Debtors' Plan (the "Confirmation Hearing").

Copies of the Plan, and its exhibits (including the Settlement Agreements) were transmitted to all interested parties including, but not limited to, John H. Ables, Earl W. Brian, Dwight W. Geduldig, John E. Koonce, Wallace Sellers, Paul Steinle, and John F. Berentson (collectively, the "Petitioners").

The Petitioners filed timely objections to the Settlement Agreements and the Plan. The Bankruptcy Court overruled the objections and authorized final approval of the Settlement Agreements. The Debtors' Plan was confirmed by Order dated June 21, 1994, and entered on the Bankruptcy Court's docket on June 23, 1994 (the "Confirmation Order").

The Petitioners appealed the Confirmation Order to the United States District Court for the Southern District of New York which affirmed the Bankruptcy Court's Confirmation Order in open Court in all respects. Attached as Appendix "A" in the Appendix of this brief is a true and correct copy of the District Court bench opinion which was omitted from Petitioners' Appendix in their Petition for Writ of Certiorari (App., *infra*, 1a). Petitioners then appealed to the United States Court of Appeals for the Second Circuit which, by Summary Order filed on November 9, 1995, affirmed the District Court's Order affirming the Bankruptcy Court's Confirmation Order. A petition for a writ of certiorari ensued.

---

[1] The Avacus Stipulation and Order and the PBGC Term Sheet are collectively known as the "Settlement Agreements". The Settlement Agreements are an integral part of the Plan.

A. THE AVACUS LAWSUIT

Infotech and five of its present or former directors are defendants in a shareholder derivative action entitled *Avacus Partners, L.P. v. Earl W. Brian, M.D., et al.*, Civil Action No. 11001, filed in the Court of Chancery of the State of Delaware in and for New Castle County (the "Avacus Lawsuit"). Avacus Partners, L.P. ("Avacus") filed an unsecured proof of claim in the Infotech proceeding in the amount of $24,767,996.00 (the "Avacus Claim").

Prior to the commencement of the bankruptcy proceeding, a special committee of the Infotech board concluded that the Avacus Lawsuit was without merit, and recommended no action be taken or pursued on behalf of Infotech.

Although the Avacus Lawsuit was automatically stayed upon Infotech's filing for Chapter 11 relief, Infotech and Avacus enjoyed a rather hostile relationship and engaged in other protracted adversarial proceedings during the bankruptcy.

In July of 1993, in what has been described as a "win-win" situation for Infotech, Infotech agreed to settle their dispute with Avacus regarding the Avacus Claim. In essence, the Avacus Stipulation and Order provided that upon the Confirmation Order becoming a Final Order, as defined in the Plan, Infotech will allow Avacus to prosecute and/or settle the Avacus Lawsuit at its sole cost and expense in exchange for a full release of the Avacus Claim against Infotech. Additionally, should Avacus obtain a recovery from its claims arising under the Avacus Lawsuit, Infotech would receive fifty percent of that recovery net of the expense of prosecution post-confirmation.

Given the contentious prior relationship between Avacus and Infotech, the parties requested that the Court "So Order" the settlement stipulation on a preliminary basis. As "So Ordered", the stipulation was binding to themselves. It provided a means for going forward with confirmation of the

Plan. On November 22, 1993, the Bankruptcy Court, as an accommodation to the settling parties (i.e. Infotech and Avacus), "So Ordered" the settlement. In so doing, the Court clearly reserved to itself final approval of the settlement in the context of a Plan Confirmation Hearing.

The Avacus Stipulation and Order clearly provided that it was to be incorporated in its entirety as an integral part of the Plan. The Avacus Stipulation and Order further provided that it would become operative upon its approval by "Final Order", as defined in the Plan. Additionally, as an express condition to the Avacus Stipulation and Order becoming effective, the "Effective Date", as defined in the Plan (ie. "the First Business Day after the Confirmation Order becomes a Final Order"), must occur. A further condition imposed under the Avacus Stipulation and Order prior to it becoming effective is a requirement that the Bankruptcy Court find that the Avacus Stipulation and Order is binding on Infotech and its estate, creditors and shareholders. Absent approval by Final Order of the Bankruptcy Court at the Confirmation Hearing, neither the Plan nor the Avacus Stipulation and Order are effective.

The Avacus Stipulation and Order is Exhibit "7" to the Plan. Infotech, as required, sought final approval of the Avacus Stipulation and Order by means expressly authorized by the Bankruptcy Code, *i.e.* by incorporating and making the settlement part of the Plan ultimately to be voted upon by all interested parties. In voting on the Plan, one voted for or against the Avacus Stipulation and Order as well as the Plan.

B. THE PBGC TERM SHEET

The Pension Benefit Guaranty Corporation (the "PBGC") filed two (2) claims aggregating over $10,100,000 in the Infotech Chapter 11 case emanating from its ownership of United Press International, Inc. ("UPI")[2] and UPI's under-

[2] UPI filed for Chapter 11 relief on August 28, 1991 in the United States Bankruptcy Court for the Southern District of New York as a

funded pension plan (the "Pension Plan"). The PBGC contended that Infotech was a "contributing sponsor" of the UPI Pension Plan (within the meaning of ERISA § 4001(13)) or a member of the contributing sponsor's "controlled group" (within the meaning of ERISA § 4001(a)(14)). Infotech thoroughly investigated the PBGC's contentions and determined that the PBGC's claims would not likely be defeated. Infotech and the PBGC subsequently entered into settlement negotiations which culminated in an agreement known as the PBGC Term Sheet.

The PBGC Term Sheet allows for the PBGC to receive, in full settlement of its allowed claims: (i) 196,000 shares of AMASYS Series "A" Preferred Stock, (ii) 645,000 AMASYS Warrants, (iii) 50% of the net recovery to Reorganized Infotech from the UPI Claim,[3] and (iv) the PBGC Notes. The PBGC Notes are in the total face amount of $1,500,000 secured by AMASYS assets. Accordingly, this settlement is quite favorable to Infotech's estate.

The Bankruptcy Court was presented with the PBGC Term Sheet for its consideration and approval at the Confirmation Hearing. The Bankruptcy Court conducted a thorough analysis of the PBGC Term Sheet under the *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct 1157 (1968) ("*TMT Trailer*") standards and found that the settlement was in the best interests of the estate and in the best business judgment of Infotech.

"related" case to the reorganizations of Infotech and Financial News Network, Inc. On May 17, 1994, the Honorable Francis G. Conrad converted the UPI Chapter 11 case to a case under Chapter 7.

[3] Infotech filed a claim against UPI in the amount of $33,657,074.00 for management fees, notes, loans, advances, interest, indemnification, and claims related to the UPI underfunded pension plan. UPI is believed to be administratively insolvent and the likelihood of a return is, at best, speculative.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. INFOTECH HAS COMPLIED WITH ALL REQUIREMENTS OF THE BANKRUPTCY CODE AND HAS VASTLY EXCEEDED THE DUE PROCESS REQUIREMENTS AS PROVIDED FOR BY RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Infotech has safeguarded Petitioners due process rights by vastly exceeding all notice requirement standards mandated by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Petitioners cannot claim that their due process rights have been violated nor can Petitioners claim that they did not have a "meaningful" opportunity to object to the Avacus Stipulation and Order and the Plan at the Confirmation Hearing.

Congress has expressly authorized the incorporation of a settlement agreement into a plan of reorganization. Section 1123(b)(3)(A) of the Bankruptcy Code states as follows:

> **Contents of plan.**
>
> (b) Subject to subsection (a) of this section, a plan may—
>
> (3) provide for—
>
> (A) the settlement or adjustment or any claim or interest belonging to the debtor or to the estate;

11 U.S.C. § 1123(b)(3)(A). Indeed, it is common practice for settlement agreements to be incorporated into a plan of reorganization. Courts interpreting Section 1123(b)(3)(A) do not challenge the appropriateness of this procedure and continue to recognize this as well established law. *See In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493 (Bankr. S.D.N.Y. 1991) (held, compromises or settlements may be effected sep-

arately during reorganization or in body of reorganization itself); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279 (Bankr. S.D.N.Y. 1990)(held, settlements forming part of Chapter 11 plan of reorganization may be approved by a bankruptcy court only if "fair and equitable"). Moreover, Petitioners do not challenge the appropriateness of this methodology.

Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure specifically address the notice required to effect due process. Rule 9019 of the Federal Rules of Bankruptcy Procedure is clear and states:

> (a) **Compromise.** On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Rule 2002(a)(3) of the Federal Rules of Bankruptcy Procedure provides for twenty (20) days notice by mail of a hearing on approval of a compromise or settlement of controversy. Not only were the aforementioned statutory requirements met, they were vastly exceeded.

The Disclosure Statement and the Plan were served upon *all* parties in interest on no less than *fifty (50)* days notice. Pursuant to an Order dated April 18, 1994 (the "Disclosure Statement Scheduling Order"), the Bankruptcy Court specifically ordered the form and manner of notice of the Confirmation Hearing and expressly decreed that such notice be deemed good and sufficient notice. The Petitioners, as interested parties, enjoyed ample opportunity to review the documents, and to make an informed decision on whether to vote for or against the Plan which incorporated in their entirety the Settlement Agreements.[4]

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[4] The Plan was overwhelmingly approved by all persons who voted. The Petitioners did not vote.

Although Petitioners did not vote on the Plan, they did object to the confirmation of the Plan citing the Avacus Stipulation and Order. The Petitioners objected that they did not have an opportunity to be heard at a "meaningful time" or in a "meaningful manner" because the Avacus Stipulation and Order was presented as a *fait accompli*. Petitioners objections were heard and overruled. As noted above, the Avacus Stipulation and Order was without meaning or effect absent the confirmation of the Plan. Creditors were given notice of the proposed Avacus Stipulation and Order and the Plan through Infotech's Plan solicitation process. The total creditor body voted overwhelmingly in favor of the Plan. Notwithstanding Petitioners contentions that they did not have a "meaningful hearing", the Bankruptcy Court heard the Petitioners' objections at the Confirmation Hearing, addressed each objection offered, overruled each objection, approved the Avacus Stipulation and Order, and confirmed Infotech's Plan. Although their objections were not sustained, the Petitioners due process rights were always protected. As the Second Circuit stated:

> . . . the November 1993 ruling was a preliminary order, binding only as between Avacus and Infotech, the only parties to the stipulation, and was expressly conditioned upon confirmation of the plan by final order of the Court. Such a ruling was not improper. Moreover, we agree with the District Court that, even if there were any error in the Bankruptcy Court's approval of the Avacus Stipulation, such error was harmless. As a result of the settlement, the Debtor resolved a claim against the Estate and was absolved of all expenses relating to a lawsuit that it found not worthy of pursuit, yet was guaranteed fifty percent of the recovery if the lawsuit succeeded. To reject such a favorable settlement would have been an abuse of discretion on the part of the Bankruptcy Court.
>
> Since appellants concede that compliance with Rule 9019 provides all the process that is due, appellant's

> claim that they were denied due process fails. Moreover, appellants' property interests were not impaired until after the Confirmation Hearing, by which time they had received notice and a hearing, thus granting them all the process they were due.

(Petitioners' App., at 3a).

Petitioners argue that the settlement negotiations were conducted in "secret" and that interested parties were excluded from any participation or review of the settlement process. The Court of Appeals for the Second Circuit has held that not all parties have a right to be involved in a settlement process. *In re Drexel Burnham Lambert Group, Inc.*, 995 F.2d 1138, 1145 (2d Cir. 1993). In any event, no where in the record on appeal can Petitioners demonstrate any evidence indicating that the proposed Avacus Stipulation and Order was accomplished in "secret" or that the Petitioners were somehow barred from asserting an objection. The disclosure of the proposed Avacus Stipulation and Order to be finally approved at the Confirmation Hearing, as discussed above, was open, notorious, and exhaustive and to which the Petitioners responded. Accordingly, the Petitioners were afforded more than adequate due process as required by Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure and had their day in court. Accordingly, Petitioners were not denied due process.

B. THE BANKRUPTCY COURT PROPERLY OBSERVED AND APPLIED THE SUPREME COURT STANDARDS IN APPROVING THE PBGC TERM SHEET

The Bankruptcy Court was presented at the Confirmation Hearing with a proposed settlement by and between Infotech and the PBGC. The Bankruptcy Court conducted a thorough analysis of the merits of the PBGC Term Sheet under the *TMT Trailer* standards and found that the settlement was in the best

interests of the estate and in the best business judgment of Infotech. Notwithstanding the Bankruptcy Court's analysis, Petitioners contend that the Bankruptcy Court's decision in approving the PBGC Term Sheet at the Confirmation Hearing was in conflict with the settlement standards announced by this Court.

TMT Trailer clearly sets forth the standard which bankruptcy courts employ in approving proposed settlement agreements. Under the standards of *TMT Trailer*, a bankruptcy court is required to make an "informed and independent" judgment as to whether proposed compromises are fair and equitable. *TMT Trailer*, 390 U.S. 414, 424, 88 S.Ct 1157, 1163. However, the Bankruptcy Court should not substitute its judgment for that of the debtors-in-possession. *Depo v. Chase Lincoln First Bank, N.A.*, 77 B.R. 381, 384, *aff'd*, 863 F.2d 45 (2d Cir. 1980). Nor is a mini-trial on the merits required for court approval. *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). Moreover, it is the responsibility of the bankruptcy judge, and the appellate courts upon review, not "to decide the numerous questions of law and fact raised by [objections] but rather to canvass the issues to see whether the settlement fall[s] below the lowest point in the range of reasonableness". *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) *cert. denied, Cosoff v. Rodman*, 464 U.S. 822, 104 S.Ct. 89 (1983), *quoting Newman v. Stein*, 464 F.2d 689, 693 (2d. Cir. 1972) *cert. denied, Benson v. Newman*, 409 U.S. 1039, 93 S.Ct. 521 (1972). At the same time, the court must bear in mind that "the law favors compromise". *In re Heissinger Resources, Ltd.*, 67 B.R. 378, 383 (C.D. Ill. 1986).

As noted earlier, the PBGC filed two (2) proof of claims in the Infotech case based upon Infotech being a "contributing sponsor" of the UPI Pension Plan or a member of the contributing sponsor's "controlled group". Twenty-six U.S.C. § 414(c) of the Internal Revenue Code is controlling to determine whether or not Infotech is within the UPI control group.

The Internal Revenue Code then references to Treasury Regulation Section 1.414(c)-2(b)(2)(A). This section provides that "controlling interest" means:

> In the case of the organization which is a corporation, ownership of stock possessing at least 80 percent of the total combined voting of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation.

Treasury Regulation Section 1.414(c)-2(b)(2)(A).

At the time that it executed the PBGC Term Sheet, Infotech had reasonably determined that it was indeed, at all relevant times, a member of the UPI control group. In fact, Infotech determined that it held approximately ninety-nine percent (99%) of the voting power in UPI. Infotech further determined that attempting to adjudicate this matter before the Bankruptcy Court carried significant risk and was likely to thwart its reorganizational goals. Accordingly, Infotech sought to settle the $10,100,000.00 PBGC claim. Employing its business judgment, Infotech successfully settled with the PBGC and substantially reduced its liability.

Notwithstanding Infotech's favorable settlement with the PBGC, Petitioners contend that because the PBGC had not selected a termination date for the UPI Pension Plan as of the date the Bankruptcy Court approved the PBGC Term Sheet, the Bankruptcy Court could not assess the strength of the PBGC's position and therefore did not conduct a proper review of the settlement. However, Infotech did not need to know the exact termination date of the UPI Pension Plan. Infotech used its business judgment and concluded that at all relevant times, Infotech would have a "controlling interest" and thus, a liability which would likely devastate any possibility of reorganization if Infotech did not settle with the PBGC. In addition, Infotech was well aware that it did not have any influence in choosing the UPI Pension Plan termi-

nation date and correctly concluded that the PBGC would choose a date in which Infotech had a controlling interest. Accordingly, Infotech determined that litigating with the PBGC would be a costly and futile endeavor.

The Bankruptcy Court, as it noted itself, played an active role in resolving the dispute and was completely familiar with the facts and circumstances and terms and conditions of the PBGC Term Sheet. (Petitioners' App., at 40a-41a). Accordingly, the Bankruptcy Court was more than able to reach an objective and informed evaluation of the strength of the PBGC's position based upon the facts which it knew exceptionally well. The Bankruptcy Court applied the facts of this case and specifically and appropriately addressed the PBGC Term Sheet under the standards as clearly announced in *TMT Trailer* to determine whether the terms of the PBGC Term Sheet settlement fell below the range of reasonableness. (Petitioners' App., at 41a-42a). Like the Avacus Stipulation and Order, the Bankruptcy Court properly authorized the approval of a settlement which substantially reduced Infotech's liability and concluded that the settlement did not fall below the lowest level of reasonableness.

In addressing Petitioners concerns, the United States Court of Appeals for the Second Circuit concluded:

> In establishing the termination date, only the interests of PBGC and the plan participants are taken into consideration. *See In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 652 (2d Cir. 1983). Knowing it had no legal role in selecting the plan termination date, Infotech made a reasonable business judgment that the termination date selected would likely be a date during which time Infotech was liable for the Pension Plan.

* * *

> Furthermore, the only additional fact appellants list as necessary for an informed decision by the Court is a fixed date for plan termination. The Court did not need to know that date in order to approve the compromise.

(Petitioners' App., at 4a-5a).

Accordingly, the Bankruptcy Court properly authorized the approval of the PBGC Term Sheet by applying the *TMT Trailer* standards and examining the "best interests of the estate" to determine whether the settlement fell below the lowest level of reasonableness. The Bankruptcy Court found that the PBGC Term Sheet was in the best interests of the estate and authorized its approval. In employing the teachings of *TMT Trailer*, the Bankruptcy Court did not abuse its discretion in approving the PBGC Term Sheet.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 6201 (LAK)

March 6, 1995

10:35 a.m.

IN RE: INFOTECHNOLOGY, INC., a Delaware Corporation,

Debtor,

Before:

HON. LEWIS A. KAPLAN,

District Judge

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* * *

[51] THE COURT: I am ready to rule on this matter.

If you bear with me, parts of this will not be as fluent as I would like, but I think it will get the job done.

These are consolidated appeals from the Bankruptcy Court confirming the plan of reorganization of Infotechnology. The appellants are five present or former directors of Infotechnology as well as three other creditors, Mercury Partners and two other individuals associated with it.

The central issues pertain to the future of the derivative action in which the director appellants are defendants and the treatment of their claims for indemnification with respect to that lawsuit. There are also issues raised with respect to a settlement between the debtor and the Pension Benefit Guaranty Corporation.

The derivative suit that I referred to was commenced in 1989 by Avacus Partners, a limited partnership, in the Delaware Chancery Court, against Infotech and the five directors who are appellants in this case. That case is entitled Avacus Partners versus Brian.

The Avacus case has been stayed since 1991 by the automatic stay provisions of the Bankruptcy Code, but presumably will come to life when Infotechnology emerges from bankruptcy. After the filing of the bankruptcy **[52]** petition, Avacus filed a proof of claim against the debtor in the amount of approximately $25 million and, by virtue of that claim, became one of the significant players in the reorganization process.

The PBGC was another key party by virtue of its having asserted claims in excess of $10 million in respect of alleged unfunded pension liabilities with respect to the pension plan of United Press International, which allegedly was controlled by Infotechnology at relevant times.

Infotechnology's efforts to devise an acceptable plan of reorganization initially met with failure. In May of 1992 and again in February of 1993, it filed proposed disclosure statements and plans of reorganization. They were opposed by Avacus and the PBGC, and on both occasions, the Bankruptcy Court denied approval of the disclosure statement. It does appear that Infotechnology concluded that it would be necessary to make peace with Avacus and the PBGC in order to have any chance of a successful reorganization.

On May of 1993, Infotechnology and the PBGC reached an agreement in principle on the PBGC claims. The agreement is set out in a document called the PBGC Term Sheet that appears at pages 297 to 304 of the record. It contemplated, in essence, that PBGC would receive a combination of notes with a face value of one and a half **[53]** million dollars as well as certain securities and warrants to purchase securities in the reorganized debtor. That agreement was expressly conditioned upon the approval by the Bankruptcy Court of a plan of reorganization that contained the material terms of the PBGC Term Sheet.

While the chronology is not particularly material, it appears that Infotechnology turned its attention to Avacus after it reached its agreement with the PBGC. Its efforts culminated in a document that contains the terms of the deal between Infotechnology and Avacus, the central provisions of which will be spoken about in a minute. The document appears at pages 285 to 295 in the record, but I pause for a moment to comment on the nature and circumstances of the settlement document.

The document bears the caption of the bankruptcy case and is entitled Stipulation and Order. It is not signed on behalf of either party. It is not dated except that it bears the notation "9/28/93" in a line on the first page that contains what appears to be a word processing code. The disclosure statement in the Bankruptcy Court says that the settlement was entered into on July 9, 1993, almost three months before the apparent date on the first page. The document was "so ordered" by the Bankruptcy judge on November 22, 1993. It

is not disputed that the Bankruptcy Court so ordered the document without any notice to **[54]** creditors, without affording any opportunity for the creditors to object, and without any hearing. Furthermore, the appellants have asserted, and none of the appellees has denied, that the settlement was negotiated in the Bankruptcy Judge's chambers with substantial participation by the court.

The material terms of the Avacus settlement are essentially these:

First, Avacus was given the exclusive right to prosecute the derivative suit on behalf of the debtor at the sole expense of Avacus with Avacus and the debtor each to receive one-half of the net recovery, if any.

Second, in the event that the Delaware Chancery Court determines that Infotechnology is obliged to indemnify any of the directors for any judgment or settlement in the derivative suit, both Avacus and the debtor waive the right to any such recovery to the extent it would create an indemnification liability on the part of Infotech. In other words, Avacus and Infotechnology agree to produce any judgment or settlement that might be obtained against the directors to the extent that Infotechnology otherwise would be obliged to indemnify the directors for that liability.

Third, in the event the Chancery Court of Delaware determines that Infotechnology is obliged to indemnify any of the director appellants in this case for **[55]** defense costs with respect to derivative suit, the appellants are entitled to only a prepetition, unsecured claim against Infotechnology and that claim is subject to allowance as to the amount allowed by the Bankruptcy Court.

Fourth, the Stipulation referred to the intention of the parties, that is Infotechnology and Avacus, to make the Stipulation a part of a plan of reorganization that Infotechnology then intended to file with the Bankruptcy Court. It set forth various provisions that Infotechnology agreed to include, and it contained Avacus' agreement to support the plan that Infotechnology then intended to present.

Fifth, among the provisions to be incorporated in the plan was the creation of a reserve of 345,000 shares of the common stock of the reorganized debtor. In the event any of the directors is found by the Delaware Chancery Court to be entitled to indemnification for defense costs with respect to the derivative suit, any allowed claim thus arising is to be satisfied only from the reserve fund and only at the rate of one share of stock per $10 of allowed claim.

Lastly, on the Settlement Date, and that phrase is a defined term in the agreement, Avacus' claim against Infotech shall be withdrawn.

Thus, to boil it all down, Infotechnology appears **[56]** to have bought off the Avacus claim and lined up its support for the plan of reorganization in exchange for one half of the value of its own claim against its own directors, if any.

It bears noting that the Stipulation and Order, one might argue, was not contingent upon approval of a plan of reorganization, a subject I will return to.

While the parties did express in the document the intention that it be included in a plan that Infotechnology then intended to present, certain aspects of the Stipulation and Order are unconditional and speak in the present tense; and thus indicate an intention that they would take effect immediately. Some of those include the agreement to support the proposed plan, which counsel for the debtor has acknowledged it was binding unconditionally as of the date the Stipulation and Order was so ordered by the Bankruptcy Judge. Others, including the provision that gives Avacus sole control of the conduct of the derivative suit, while unconditional and speaking in the present tense, are provisions which Avacus and the debtor contend were conditioned upon the plan of confirmation being approved and confirmed and the order of confirmation becoming final.

As I say, the debtor and Avacus argue that the terms of the Stipulation and Order which are pertinent here were conditioned on the plan becoming effective and being **[57]** confirmed. They point to various language in the document, including a variety of defined terms that I needn't allude to

now, because they were the subject of colloquy. Suffice it to say that one could certainly have expressed that view a lot more clearly than the document expressed it. For example, it was expressed with great clarity, the very same concept, in the PBGC Term Sheet.

In any case, on January 31, 1994, Infotechnology filed a proposed disclosure statement and plan that contained both the Avacus stipulation and the PBGC Term Sheet. The appellants, all of them, contend that they had no prior notice of the Avacus and PBGC Settlements and certainly no participation in the negotiations of which those settlements were the products.

There was a hearing on the disclosure statement in March. The disclosure statement was approved on April 18, and in due course, the appellants filed objections to the plan in May and June 1994. The Bankruptcy Court held a hearing on June 21, 1994 at which the objections were heard and rejected, and the order appealed from was entered later on June 21, 1994.

Now, the principal attack leveled here is that the Bankruptcy Judge approved both the Avacus settlement and the PBGC settlement without notice and without opportunity to be heard on the part of the appellants in this case in **[58]** violation of Bankruptcy Rule 9019 and the alleged rights of the appellants to due process of law. Consideration of this issue, I think, is best undertaken against the context in which negotiations such as those at issue here and reorganizations in complex matters like this take place.

It is, I think, a commonplace, and certainly no one has suggested otherwise in the course of this morning's argument, that is complicated Chapter 7 matters plans of reorganization are in fact negotiated primarily between the major parties to the reorganization and do not include all of the creditors or all of the parties in interest. In fact, as the Second Circuit made clear in one of the Drexel decisions, we would seldom have a plan of reorganization in a complex matter if indeed all of the creditors had to be involved in every stage of the proceedings. I take it, although there was some perhaps contrary suggestion in the papers filed by the appellants, that the appellants don't

really dispute that this morning. So that to the extent that there is an objection here based on the assertion that the appellants were not given a place at the bargaining table with respect to the Avacus or the PBGC settlement, I take it as withdrawn and in any case it lacks merit.

Now, we also had here quite obviously as we do in many major reorganization proceedings extensive participation by the Bankruptcy Judge charged with the **[59]** matter in the settlement process. That too is, as I think I may have said a moment ago, quite common. There was, at least in my experience, one respect in this case in which it differed from that which is commonplace, and that is that the Bankruptcy Judge here "so ordered" the Stipulation and Order between Avacus and Infotechnology, although that is not so of the PBGC Term Sheet.

Now, one can readily understand the concerns that are put forward on behalf of the appellants in view of the so ordering of the Stipulation and Order by the Bankruptcy Judge.

The purpose of Rule 9019 is to insure that parties in interest be given an opportunity to comment upon proposed settlements and compromises of disputes between a debtor and others before the court places its imprimatur on the deal, whereas here the Bankruptcy Court appears to have granted that imprimatur in circumstances in which the appellants had no idea of what was taking place, no idea of what the deal was or indeed that there was a deal, and no opportunity to comment to or attempt to influence the Bankruptcy Judge at the point where he so ordered the stipulation. There is an appearance of a possibility that the court had committed itself in a substantive way to the transaction embodied in the Stipulation and Order. Moreover, having regard to the realities of the **[60]** reorganization process, the appellants quite fairly comment that as arrangements are made with one major creditor constituency and then another, putting in place, building blocks, moving toward having a confirmation of a plan, the process acquires a momentum that makes it difficult or at least apparently difficult for anyone objecting to the plan that emerges from these negotiations to have any influence. And

the risk of course is, or the concern rather advanced by the appellants is, that by the time they had a chance to say anything on the subject of the Avacus settlement, the Bankruptcy Judge who had previously so ordered the stipulation was sufficiently committed to getting a reorganization done that what took place at the hearing of the confirmation of the plan was more form than substance.

If I were persuaded that the Bankruptcy Court in so ordering the Stipulation and Order had in fact committed itself to the substance of the compromise embodied in that document, I would not hesitate to upset the plan even at this late date, momentum or no momentum. I am satisfied that I should not do so in this case for two reasons:

First of all, I am reasonably confident that the Avacus settlement with Infotechnology was, as the appellees claim, contingent on the occurrence of a confirmed plan, the occurrence of the Settlement Date, as that term is used in the Stipulation and Order.

[61] While the drafting of the document leaves something to be desired from this point of view, I am moved by two considerations. The first and the most important by far is the fact that the provision of the stipulation and order which obligates Avacus to withdraw the $25 million claim against the estate of the debtor is expressly conditioned upon the occurrence of the Settlement Date. Had that not been so, had the withdrawal of the claim been effective or arguably effective as of the date of the stipulation, we might well have reached a different result in this case.

Secondly, with regard to the difficulties in the drafting of the document, I must say that I have before me all of the parties to the document. They all tell me what it meant. It is a reasonable interpretation. Indeed, I am hard-pressed to figure out a different one. There is no evidence to the contrary.

Therefore, I conclude that the deal in fact was contingent on a confirmed plan of reorganization.

That being the case, it seems to me that I have to accept that the Bankruptcy Judge regarded himself as free to evaluate the plan of reorganization on its merits at the time it was

put forward to take into consideration the objections that were put forward on behalf of the appellants and to deal with them appropriately on the merits.

[62] While it might well have been preferable, even if only from an appearance standpoint, for the Stipulation and Order not to have been so ordered, I think in the last analysis, the Bankruptcy Judge must be presumed to have considered the plan on the merits when it was presented for confirmation.

I am buttressed in reaching this result by the fact that, in my view, any error with respect to the notice, if error there was, was harmless, given the fact that I am inclined to the view that a rejection of this settlement by the Bankruptcy Judge would have been an abuse of discretion and improper.

This was, as one of the counsel put it in the hearing on plan confirmation, a win, win situation for the debtor. The debtor bought off a claim against the assets of the estate in the amount of $25 million. I assume, though, it makes no difference to my ruling, that this was a vastly exaggerated claim, exaggerated for the purpose that many creditors holding unliquidated and contingent claims exaggerate in bankruptcy. Nevertheless, there was at least, in theory, some exposure to the estate.

The debtor got rid of that claim for a 50 percent interest in the net recovery in a derivative suit which the debtor, by virtue of an independent board committee, previously had concluded was not worth pursuing. That being **[63]** the case, it bought off something of arguably some value, that is, a claim of some value against the assets of the debtor in exchange for a 50 percent interest in an asset that the debtor had concluded was substantially worthless. Under those circumstances, I can't see how the Bankruptcy Court could have failed to approve the settlement.

I take note of the various points of Delaware law that are raised with respect to the claimed illegality of the settlement. I regard the Delaware law points as frivolous and the Bankruptcy Code points directed at the same issue, namely, whether it was appropriate to vest control over the derivative action in Avacus, as without merit. I take what was done here

as no different from the debtor writing a check on its bank account. It has the right to do that. It has the right to assign an interest in a claim and, in consequence, I see nothing in the Delaware General Corporation Law that is at cross-purposes with this settlement.

Now, that takes me to the PBGC claim for the claim alleging the PBGC's settlement.

The first argument is the assertion parallel to that with respect to the Avacus settlement: That the Bankruptcy Court approved the settlement without notice and opportunity to be heard. I regard the question that was posed in the context of the Avacus settlement as interesting **[64]** and somewhat troublesome. I regard this one as neither.

Here it is perfectly clear that the PBGC Settlement was contingent upon a confirmed plan, and there is not even the ghost of an argument that the Bankruptcy Judge committed himself to the substance of the PBGC settlement in anything remotely approaching the so ordered stipulation on the Avacus settlement. The opportunity that the appellants had with respect to notice and a hearing upon plan confirmation was all they were entitled to with respect to the PBGC settlement.

There is a claim also that the approval of the PBGC settlement was improper. I may not use in the context of this bench opinion all of the right bankruptcy buzz words, but the substance of the claim is that the Bankruptcy Judge failed adequately to consider the merits of the settlement. The appellants argue that the PBGC was unfairly overcompensated because in their view, the claim of the PBGC was far too weak to justify the settlement that it receives under the plan.

Now, all of this hinges on the question of whether the debtor is liable for the unfunded pension liabilities of UPI, Inc.

It is undisputed that the debtor, as of June 27th, 1992, which in due course became the plan termination date, was the holder of more than 80 percent of the shares **[65]** of UPI, Inc. The regulations adopted and that are applicable here provide a bright line test that measures control, upon which the liability of the debtor, for the unfunded pension liability,

turns, solely in terms of 80 percent share ownership. In consequence, if the determination of the plan termination date by the PBGC was valid and controlling, the appellants, quite apart from any issues of scope of review, acknowledge that they are dead in the water because the debtor was on the hook for 100 percent of the underfunded pension liability.

Now, I recognize that my scope of review on this point is very narrow, and I don't mean to depart in any way from that. I talk about the merits here only because they are so clear that on any view of any scope of review, even de novo, this argument is a dead loser for the appellants.

The basic argument, as I understand it, is that the plan termination date is the product of a plan termination, which itself was the result of an agreement between the Chapter 7 trustee of UPI, Inc. and the PBGC, and it is that agreement that produces the June 27th, 1992 date. I gather that the argument is that the agreement, in order to terminate the plan effectively, had to be an agreement between the PBGC and the plan administrator. The difficulty, of course, is that by the time this occurred—the termination of the plan—there was no plan **[66]** administrator. UPI was in a Chaptcr 7 proceeding under the Bankruptcy Code. The agreement was then made with a Chapter 7 trustee, and as I understand the law, and I refer to the Fifth Circuit case that I thought I had with me a moment ago, was In Re: Esco.

MR. RICKETT: PBGC versus trustees, bankruptcy trustee of Esco Manufacturing.

It's In the matter of E-S-C-O, Esco Manufacturing Codebtor: Pension Benefit Guaranty Corp. versus Prichard, 33 F.3d 509, decided by the Fifth Circuit last year.

Under that case, it seems to me quite clear that the agreement to terminate in these circumstances between the Chapter 7 trustee and the PBGC was effective given that conclusion and given the appellants' acknowledgment during the argument that although the planned termination had not occurred at the time Judge Conrad confirmed the plan, the fact of the plan termination must be taken into account in

deciding these appeals. I regard this as being no colorable claim with respect to the PBGC settlement.

For all of the foregoing reasons, I affirm the order confirming the plan of reorganization. Gentlemen, is there anything that I have missed that I ought to say a word about? None.

Then I reserve the right to make any editorial changes that seem appropriate. But the foregoing is the **[67]** decision of this court. Thank you all.

MR. ANGEL: Thank you very much, your Honor.

MR. SILVERSTEIN: Thank you. your Honor.

MR. LUSKIN: Thank you, your Honor.